PP

v.

NORFAIZAL

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL TRIAL NO: 45-1-02]
4 NOVEMBER 2003

CRIMINAL PROCEDURE: *Trial - Opening statement - Proposed evidence to prove guilt of accused - Duty of prosecution - Failure to mention evidence of written admission by accused - Whether fatal to admissibility thereof - Attempt to introduce evidence in trial - Whether an afterthought - Criminal Procedure Code s. 179(i)*

CRIMINAL PROCEDURE: *Trial - Cautioned statement - Admissibility - Administration of caution to multiple accused - Whether to be separately administered - Administration of single caution to two persons - Whether flawed - Dangerous Drugs Act 1952 ss. 37A, 39B(2)*

The accused was charged with the offence of trafficking in dangerous drugs under s. 39B(2) Dangerous Drugs Act 1952 ('the Act'). In the course of its case, the prosecution sought to adduce evidence of a written cautioned statement ('ID15') purportedly made by the accused to an active member of the investigation team ('SP4'). The facts showed however that the prosecution, when presenting its opening speech pursuant to s. 179(i) of the Criminal Procedure Code ('CPC'), only referred to an oral admission and did not at all mention about ID15. The facts further showed that SP4, whilst administering the caution, had actually administered it to the accused and another person, but had not done so separately or individually to each of them. The defence objected to the admissibility of ID15, and a preliminary issue hence arose as to whether ID15 could be admitted into evidence bearing in mind the facts and the import of s. 179(i) CPC and s. 37A of the Act.

Held (allowing the objection):

[1] The prosecution's opening speech made no mention whatsoever of any written admission such as that purportedly contained in ID15. In the circumstances, ID15 must be held as an afterthought, as the prosecution, at the outset, had never sought to adduce any evidence pertaining to the

written cautioned statement in ID15. This failure to comply with the mandatory provision of s. 179(i) of the CPC is fatal to the admissibility of ID15. ID15, in any case, was recorded in a haphazard manner thereby causing considerable doubt as to its voluntariness. (p 586 f)

[2] Proviso (b) to s. 37A(1) of the Act is clear ie, an individual accused in his own right is entitled to be administered a caution, and by corollary, if there are multiple accused, as in the instant case, where two have been arrested, each and every one of them is individually entitled to have the caution administered to him. (p 587 f)

[3] SP4 was obviously an active member of the investigation team which effected the arrest on the accused and another person. As such he should not play the role of a recording officer as he has expressly purported to do in ID15. Being a person who is obviously interested in the outcome of his investigation, there is a real likelihood of impartiality or bias. ID15 in the circumstances is inadmissible. (p 587 h)

Case(s) referred to:

Ah Mee v. PP [1967] MLJ 220 FC ***(refd)***
Chan Ming Cheng v. PP [2002] 4 CLJ 77 CA ***(refd)***
DPP v. Ping Lin [1975] 3 All ER 175 ***(refd)***
Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535 SC ***(refd)***
Inspector-General Of Police & Anor v. Alan Noor Kamat [1988] 1 MLJ 260; [1987] 1 LNS 101 SC ***(refd)***
Lee Look v. PP [1985] 1 MLJ 240 HC ***(refd)***
PP v. Kang Choo Heng & Anor [1991] 3 CLJ 2574; [1991] 3 CLJ (Rep) 545 HC ***(foll)***
PP v. Lee Chee Meng & Anor [1991] 1 MLJ 226 ***(refd)***
PP v. Mohd Fahmi Hamzah [2002] 6 MLJ 340 ***(refd)***
PP v. Mohd Fuzi Wan Teh & Anor [1989] 2 CLJ 652; [1989] 2 CLJ (Rep) 341 HC ***(refd)***
PP v. Msimanga Lesaly & Anor [2000] 5 CLJ 261 ***(foll)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 HC ***(refd)***
PP v. Sulaiman Mohamad Noor [1996] 1 MLJ 196 ***(refd)***
PP v. Tan Boon Kwai [1990] 2 CLJ 661; [1990] 2 CLJ (Rep) 844 HC ***(refd)***
PP v. Tay Bee Seng [1993] 1 CLJ 526 HC ***(refd)***
PP v. Yong Kong Hin [1981] 1 CLJ 178; [1981] CLJ (Rep) 259 HC ***(refd)***
Tan Too Kia v. PP [1980] 2 MLJ 187 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 179(i) chapter xx
Dangerous Drugs Act 1952, ss. 37A(1)(a), (b), 39B(2)

For the accused - Markhan Singh; M/s Mohd Latip & Assocs
For the prosecution - Faradziah Kasah, DPP

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Introduction

The accused was charged with the offence of trafficking in 1036.9gm of cannabis, punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act").

In the course of presenting the case for the prosecution, the prosecution sought to adduce evidence of a cautioned statement in writing purportedly made by the accused to SP4 chief inspector Mustafa Kamal bin Rashid of the narcotics department of the Melaka police contingent.

As there was vehement objection by the defence to the admissibility of the cautioned statement, I proceeded to hold a trial within a trial in order to determine this issue.

Finding Of Facts

The opening speech of the prosecution contains, *inter alia*, the following passage:

> Pihak Pendakwaan juga akan membuktikan bahawa OKT membuat pengakuan secara lisan bahawa beliau ada menyimpan dadah dalam kereta tersebut.

[My translation:

The prosecution will also prove that the accused made an oral admission that he has kept drugs in the car.]

The recording officer, chief inspector Mustafa Kamal, was an active member of the investigation team in this case. He testified that he had administered and explained to the accused the caution in Bahasa Malaysia under s. 37 of the Act and that the accused understood the caution.

He added that at the material time, the accused was not handcuffed, nor assaulted by the police. There was also no threat, promise or inducement by the police. The accused's cautioned statement was tendered as ID.15.

Chief inspector Mustafa Kamal revealed that he administered the caution to the accused and another person after he has arrested the accused, and that the cautioned statement was recorded from the accused and another person. One caution was administered to both of them. The contents of ID.15 are so essential that they merit reproduction as follows:

> Kata-kata amaran telah dibacakan pada 6.2.02 jam lebihkurang 1735 hours terhadap penama Azril Bin Ayub, KP: 810517-05-5085 dan Norfaizal Bin Mat KP: 801017-14-5207. Kata-kata amaran dibawah sek. 37A(1)(b) ADB 1952 dalam Bahasa Malaysia seperti berikut:
>
> > Adalah menjadi kewajipan saya memberi amaran kepada kamu bahawa kamu tidak diwajibkan berkata apa-apa jua atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu katakan samada sebagai jawapan kepada sesuatu soalan ataupun tidak, boleh diberikan sebagai keterangan.
> >
> > S: Dalam beg plastik hitam ini ada apa?
> >
> > J: Ada ganja (dijawab oleh penama Norfaizal manakala penama Azril mendiamkan diri saja).
> >
> > S: Ada apa-apa lagi yang kamu nak cakapkan?
> >
> > J: Tidak ada (dijawab oleh Norfaizal & Azril).
> >
> > S: Adakah kamu berkata benar?
> >
> > J: Benar.
>
t.t. saspek	t.t. saspek	t.t. pegawai perakam	t.t. saksi
NORFAIZAL	Azril	C/Insp. Mustafa	C/Insp. Mat Yatim

[My translation of cautioned statement ID.15:

The caution was read on 6 February 2002 at about 1735 hours to the named persons Azril Bin Ayub KP 810517-05-5085 and Norfaizal bin Mat KP 801017-14-5207. The caution under s. 37A(1)(b) of the Act in Bahasa Malaysia is as follows:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.
>
> Q: What is it in this black plastic bag?
>
> A: Ganja (answered by Norfaizal while Azril merely remained silent).

Q: Do you wish to say anything else?

A: No, nothing (answered by Norfaizal and Azril)

Q: Do you speak the truth?

A: Yes.

sgd.	sgd.	sgd.	sgd.
Suspect	suspect	Recording	witness
NORFAIZAL	Azril	C/Insp	C/Insp
	Mustafa		Mat Yatim]

Submission For Accused

Markhan Singh, learned counsel for the accused, referred to the prosecution's opening statement which did not include the accused's cautioned statement in writing, whereas ID.15 is now produced. On the basis of *PP v. Kang Choo Heng & Anor* [1991] 3 CLJ 2574; [1991] 3 CLJ (Rep) 545, he submitted that ID.15 is an afterthought.

It was submitted that the burden is on the prosecution to show positively that the cautioned statement was voluntarily given, on the authorities of *Chan Ming Cheng v. PP* [2002] 4 CLJ 77 CA; and *Hasibullah Mohd Ghazali v. PP* [1993] 4 CLJ 535 SC. He added that ID.15 was recorded in a haphazard manner as chief inspector, being the investigating officer, should not be the recording officer and so it was not in compliance with s. 37A of the Act. Reliance was placed on *PP v. Muhamad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408; *PP v. Tay Bee Seng* [1993] 1 CLJ 526; *Lee Look v. PP* [1985] 1 MLJ 240 HC.

He stressed that ID.15 did not indicate that both the accused and the other person understood the caution, nor were they asked any question as to the voluntariness of the cautioned statement, citing *PP v. Msimanga Lesaly & Anor* [2000] 5 CLJ 261; and *PP v. Kang Choo Heng, supra*.

It was then contended that ID.15 was not read to the accused and the other person before it was signed by them, nor was the accused told that he was not bound to answer any question put to him. *PP v. Tan Boon Kwai* [1990] 2 CLJ 661; [1990] 2 CLJ (Rep) 844 was cited in support thereof.

He submitted that ID.15 has not complied with s. 37A(1)(a) of the Act and that no parol evidence should be adduced to add to ID.15. *PP v. Mohd Fahmi Hamzah* [2002] 6 MLJ 340; *Inspector-General Of Police & Anor v. Alan Noor Kamat* [1988] 1 MLJ 260; [1987] 1 LNS 101 SC; *PP v. Sulaiman Mohamad Noor* [1996] 1 MLJ 196; *Ah Mee v. PP* [1967] 220 FC; *PP v. Tay Bee Seng, supra.*

Contention For Prosecution

Faradziah bt Kasah, learned deputy public prosecutor, contended in essence that ID.15 is admissible as the caution has been administered to the accused at the scene of the alleged offence and that the statement was voluntarily made, as there was no threat, promise or inducement.

Decision Of The Court

Opening Statement

Section 179(i) in Chapter XX of the Criminal Procedure Code which provides for trials before the High Court, expressly regulates the opening statement as follows:

> (i) The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

It is therefore mandatory and incumbent upon the prosecution to open the case by stating, *inter alia*, the proposed evidence to prove the guilt of the accused. Where e.g. in the opening speech, the prosecution has failed to mention the alleged admission by the accused but only introduced it in the trial proper, it was held to be an afterthought: *PP v. Kang Choo Heng, supra,* per Richard Talalla J (as he then was).

In the case before me, the prosecution's opening speech made no mention whatsoever of any written admission such as that purportedly contained in ID.15, but it made mere reference to the accused's oral admission. In the circumstances, I hold that ID.15 is an afterthought, as the prosecution at the outset had never sought to adduce any evidence pertaining to the written cautioned statement in ID.15. This failure on the prosecution to comply with the mandatory provision of s. 179(i) of the Criminal Procedure Code is fatal to the admissibility of ID. 15.

Be that as it may, I shall nevertheless proceed to consider the strength or weakness of ID.15.

Burden Of Proof

As ID.15 has been vehemently objected to, it is incumbent upon the prosecution to prove beyond reasonable doubt that it has been made voluntarily: *Deputy Public Prosecutor v. Ping Lin* [1975] 3 All ER 175; *Tan Too Kia v. PP* [1980] 2 MLJ 187 (FC); *Hasibullah Mohd Ghazali, supra,* SC. It is not for the accused to prove his involuntariness.

It is my specific finding that ID.15 did not appear to have been voluntarily given by the accused. To say the least, it was recorded in a haphazard manner thereby causing considerable doubt as to voluntariness of the accused by way of illustration.

Section 37A(l)(b) Of The Act

Section 37A provides generally for the admission of any statement given by an accused person in the circumstances spelt out therein, but proviso (b) thereto expressly prescribes that no such statement shall be admissible or used as aforesaid:

> (b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to him

ID. 15 shows that only one caution was administered when it was intended for two persons. I agree with the judgment of Mohd Hishamudin, J in *Msimanga Lesaly, supra*, that where there are multiple accused, the caution must be administered separately to each of them.

In *Kang Choo Heng & Anor, supra*, one caution was administered in the singular when there were two accused. Richard Talalla J (as he then was), expressed doubts as to whether s. 37A of the Act permits a caution to be uttered in the singular when administered to more than one person and held that *prima facie* each person should have been separately cautioned.

In my view, proviso (b) to s. 37A(1) is clear and it is the duty of the court to give effect to the intention of Parliament ie, an individual accused in his own right is entitled to be administered a caution, and by corollary, if there are multiple accused, as in the instant case, two persons have been arrested, each and every one of them is individually entitled to have the caution administered to him. This is a measure by way of a safeguard, so that he may individually or separately exercise his right to remain silent if he is minded to do so.

Investigating Officer Not To Be Recording Officer

Chief inspector Mustafa Kamal was obviously an active member and participant in the investigation team which effected the arrest on the accused and another person. As such, he should not play the role of a recording officer, as he has expressly purported to do so in ID.15. Being a person who is obviously interested in the outcome of his investigation, there is in my view a real likelihood of partiality or bias. In the circumstances, he should have handed over the accused to another police officer who is not a member or participant in the investigation team.

A statement recorded by an investigating officer actively involved in the investigation of a case was held by Gunn Chit Tuan J (later CJ (M)) to be inadmissible due to a likelihood of bias in *Lee Look, supra*.

This rule of prudence and expedience was enunciated in *PP v. Yong Kong Hin* [1981] 1 CLJ 178; [1981] CLJ (Rep) 259 on the basis that an investigating officer and those participating in or having a detailed knowledge of the case should refrain from playing the role of a recording officer, as the element of objectivity is likely to be affected: *PP v. Mohd Fuzi Wan Teh & Anor* [1989] 2 CLJ 652; [1989] 2 CLJ (Rep) 341; *PP v. Lee Chee Meng & Anor* [1991] 1 MLJ 226.

Other Issues

I commend the accused's learned counsel for his effort in raising several other issues but I do not propose to deal with them here as the foregoing grounds are adequate for me to arrive at a conclusion on the admissibility of ID.15.

Conclusion

On the foregoing grounds, I make a ruling that ID.15 is inadmissible.